

Administrative Office of the Courts

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MEMORANDUM (updated 12/06/12)

This memorandum lists the instructions the Tennessee Pattern Jury Instruction Committee (Criminal) changed or created after the 16th edition of the book was published in 2012. The Administrative Office of the Courts' website includes Word and WordPerfect "without comments and footnotes" versions of the instructions at issue. The "with comments and footnotes" version of newly-created instruction 31.21 is attached to this memorandum.

1.00 - Preliminary Jury Instructions

a. Immediately prior to the paragraph on p.6 which begins with "After you have heard all of the evidence," add a new paragraph IN BRACKETS with the following text: [Languages other than English may be used during this trial. The evidence that you are to consider is only that provided through the official court interpreter. Although some of you may know the language of the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must disregard any different meaning of the non-English words.]

2.06 - Burden of Proof: Venue (Computer Offenses)

- a. Delete the "and" at the end of section (b), delete the period at the end of section (c) and substitute a semi-colon followed by "and" and insert the following new section (d):
- (d) [Only for computer offenses punishable as theft committed on or after 7/1/12:] in any county where one (1) or more elements of the offense occurred, or in the county where an act of solicitation, inducement, offer, acceptance, delivery, storage, or financial transaction occurred involving the property, service or article of the victim.
 - b. Following this new section (d), insert a footnote with the following text: T.C.A. § 39-14-105(c).

8.01 - Kidnapping

a. In the last line of the paragraph which begins with "Unless you find beyond a reasonable doubt" on page 174, delete "[especially] [aggravated] [kidnapping] [false imprisonment]" and substitute "kidnapping" without brackets.

8.02 - Aggravated Kidnapping

- a. In the second line of the paragraph which begins with "only include if another offense was committed" on page 178, delete "kidnapping" and substitute "aggravated kidnapping"
- b. In the last line of the paragraph which begins with "Unless you find beyond a reasonable doubt" on page 179, delete "[especially] [aggravated] [kidnapping] [false imprisonment]" and substitute "aggravated kidnapping" without brackets.

8.03 - Especially Aggravated Kidnapping

- a. In the second line of the paragraph which begins with "only include if another offense was committed" on page 183, delete "kidnapping" and substitute "especially aggravated kidnapping"
- b. In the last line of the paragraph which begins with "Unless you find beyond a reasonable doubt" on page 184, delete "[especially] [aggravated] [kidnapping] [false imprisonment]" and substitute "especially aggravated kidnapping" without brackets.

8.05 - False Imprisonment

- a. In the second line of the paragraph which begins with "only include if another offense was committed" on page 193, delete "kidnapping" and substitute "false imprisonment"
- b. In the last line of the paragraph which begins with "Unless you find beyond a reasonable doubt" on page 194, delete "[especially] [aggravated] [kidnapping] [false imprisonment]" and substitute "false imprisonment" without brackets.

9.02 – Aggravated Robbery

- a. Delete the text of element (4) on p. 215 and substitute the following text (the bracketed language will be italicized): that the defendant took such property from the person of another by [the use of violence] [putting the person in fear] [the use of violence or by putting the person in fear]
- b. Between the word "fear" and the closing bracket in the third set of bracketed language, insert a footnote which has the following text: Unless both fear and violence are mentioned in the indictment, this third bracket should not be used as "the accused cannot be tried for or convicted of an offense not charged in the indictment or information." *State v. Goodson*, 77 S.W.3d 240, 244 (Tenn. Crim. App. 2001).
- c. On p. 216, put brackets around the paragraph which begins with "The fear constituting"
- d. On p. 219, put brackets around the definition of violence. Since there is already a bracket at the end of that paragraph, there will now be two brackets.

11.03(a) - Fixing Value

- a. On p. 392, add a new <u>bracketed</u> section (F), which will have the following text: If the animal killed was a police dog, fire dog, search and rescue dog, service animal or police horse, the jury shall consider the value of the police dog, fire dog, search and rescue dog, service animal or police horse as both the cost of the animal and any specialized training the animal received.
- b. Following this new language, add a footnote which has the following text: T.C.A. § 39-14-205(a)(2).
- c. On p. 392, add a new <u>bracketed</u> section (G), which will have the following text: In determining the value of the property vandalized, the value of the property shall be fixed at the amount of the damage, the reasonable cost of repairing the damage to the property, or the cost of replacement of the property vandalized.
- d. Following this new language, insert a footnote which has the following text: See T.P.I. CIVIL 14.45.
- e. On p. 392, add a new <u>bracketed</u> section (H), which will have the following text: In determining the value of the destruction or interference, the value of the destruction shall be fixed at the amount of the damage or the cost of replacement of the property. The value of the interference shall be fixed at the amount of the interference to the railroad.
- f. Following this new language, insert a footnote which has the following text: T.C.A. § 39-14-114(b).
- g. On p. 392, add a new <u>bracketed</u> section (I), which will have the following text: [For a violation of 16.01 and 16.03 and a violation of some provisions in 16.02 only] Value includes [the face value of the creation of or amount of alteration to any financial instrument or of an electronic transfer of funds] [the cost of any alteration, damage, destruction or disruption to any computer, computer system, computer network, computer software, program, or data] [the market value of any unauthorized copy, in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network] [the amount of any proceeds received, concealed or used].
- h. Following this new language, insert a footnote which has the following text: T.C.A. § 39-14-602(a)-(c).
- i. In the third line of the first paragraph, on p. 391, insert "[money]" after "[property] [services]" and prior to the period. Italicize this new language. The existing language is already italicized.

12.02 - Intentional Killing of Animal

- a. Delete the last paragraph of this instruction (pp. 503-04) and substitute the following bracketed text: [The trial judge should now instruct the jury with respect to fixing the value of the animal killed utilizing T.P.I. Crim. 11.03(a), Fixing Value, using both sections (A) and (F), if applicable.]
- b. Add a new comment with the following text: Venue in a prosecution for this offense shall be in the county where one (1) or more elements of the offense occurred, or in the county where an act

of solicitation, inducement, offer, acceptance, delivery, storage, or financial transaction occurred involving the animal.

<u> 14.04 – Vandalism</u>

a. Delete the last paragraph of this instruction (p. 561) and substitute the following bracketed text: [The trial judge should now instruct the jury with respect to fixing the value of the property damaged or destroyed utilizing T.P.I. – Crim. 11.03(a), Fixing Value, using both sections (A) and (G), if applicable.]

14.11 - Destruction or Interference with Property Utilized by Railroads

- a. Delete the last paragraph of the instruction on p. 581 and substitute the following text: [If the offense on trial does not involve imminent danger of death or serious bodily injury, the trial judge should now instruct the jury with respect to fixing the value of the destruction or interference utilizing T.P.I. -- CRIM. 11.03(a), Fixing Value, using both sections (A) and (H), if applicable.]
- b. Insert the following text at the end of the second paragraph of Comment One: If it is punished as theft, venue in a prosecution for this offense shall be in the county where one (1) or more elements of the offense occurred, or in the county where an act of solicitation, inducement, offer, acceptance, delivery, storage, or financial transaction occurred involving the property.
- c. In the second line of the second paragraph of Comment One, delete "death of serious bodily injury" and substitute "death or serious bodily injury."

16.01 - Accessing Computer to Obtain by False Pretenses

a. Add the following as a new Part C on p. 615 (include an "or" between Parts B and C):

or

[Part C:

- (1) that the defendant, directly or indirectly, [accessed] [caused to be accessed] [attempted to access] any [telephone system] [telecommunications facility] [computer software] [computer program] [data] [computer] [computer system] [computer network] or any part thereof; and
- (2) that the access was for the purpose of effecting the creation or alteration of [a financial instrument] [an electronic transfer of funds] with the intent to disrupt, alter, misappropriate, or commit fraud:

and

(3) that the defendant acted knowingly.

and

- (4) that the offense was committed in connection with an act of terrorism.]]
 - b. In Part A AND in Part B, delete the bracket at the end of element 3 and insert the following:

and

- (4) that the offense was committed in connection with an act of terrorism.]]
 - c. Delete the last paragraph of this instruction on p.618 and substitute the following text: [The trial judge should now instruct the jury with respect to fixing value utilizing T.P.I. CRIM. 11.03(a), Fixing Value, using both sections (A) and (I), if applicable.]
 - d. After each of the elements in which the terrorism language was added, insert a footnote with the following text after the first closing bracket which follows "terrorism.": The trial judge may wish to utilize T.P.I. Crim. 30.15, Terrorism.
 - e. Delete the last sentence of Comment 1 and substitute the following: Any person who violates this section in connection with an act of terrorism commits a Class A felony. T.C.A. § 39-14-602(d).

16.02 - Accessing, Altering or Contaminating Computer or Computer Security Device Without Authorization

a. Delete Part D, insert the new language below as a new Part D, and insert the following new Part E:

[Part D:

- (1) that the defendant, without authorization, directly or indirectly [accessed] [caused to be accessed] [attempted to access] any computer software, computer network, or any part thereof; and
- (2) that this act was committed [for the purpose of maliciously gaining access to computer material] [to tamper maliciously with computer security devices including, but not limited to, system hackers];

and

(3) that the defendant acted intentionally.

and

(4) that the offense was committed in connection with an act of terrorism.]]

or

[Part E:

(1) that the defendant, without authorization, directly or indirectly [made] [caused to be made] an unauthorized copy, in any form, including, but not limited to any [printed] [electronic form of] computer [data] [programs] [software] [residing in] [communicated by] [produced by] a computer or computer network;

and

(2) that the defendant acted intentionally.

and

- (3) that the offense was committed in connection with an act of terrorism.]]
 - b. Delete the last paragraph of this instruction on p. 618 and substitute the following text: [For Parts B and E, the trial judge should now instruct the jury with respect to fixing value utilizing T.P.I. CRIM. 11.03(a), Fixing Value, using both sections (A) and (I), if applicable.]
 - c. In Part A, Part B, <u>AND</u> Part C, delete the bracket at the end of the last element and insert the following:

and

- (3) that the offense was committed in connection with an act of terrorism.]]
 - d. In element 3 of Parts A, B, C and E and in element 4 of Part D, insert a footnote with the following text after the first closing bracket which follows "terrorism.": The trial judge may wish to utilize T.P.I. Crim. 30.15, Terrorism.
 - e. Delete the last sentence of Comment 1 and substitute the following: Any person who violates this section in connection with an act of terrorism commits a Class A felony. T.C.A. § 39-14-602(d).

<u>16.03 – Receiving, Concealing, Using or Aiding Another in Receiving, Concealing or Using Proceeds from Computer Crimes</u>

- a. Delete the last paragraph of the instruction on p. 628 and substitute the following: [The trial judge should now instruct the jury with respect to fixing value utilizing T.P.I. CRIM. 11.03(a), Fixing Value, using both sections (A) and (I), if applicable.]
- b. In Part A AND Part B, delete the bracket after element (2) and insert the following:

and

- (3) that the offense was committed in connection with an act of terrorism.]]
- c. After each of the elements in which the terrorism language was added, insert a footnote with the following text after the first closing bracket which follows "terrorism.": The trial judge may wish to utilize T.P.I. Crim. 30.15, Terrorism.
- d. Delete the last sentence of Comment 1 and substitute the following: Any person who violates this section in connection with an act of terrorism commits a Class A felony. T.C.A. § 39-14-602(d).

30.12(a) – Stalking (on or after 7/1/05)

a. Add the following after element (2):

[For offenses committed on or after 5/21/12: and

- (3) that the defendant, at the time of the offense, was required to or was registered with the Tennessee Bureau of Investigation as a sexual offender, violent sexual offender or violent juvenile sexual offender, as defined in § 40-39-202.]
- b. Add a footnote after the closing bracket of this new text. The text of the footnote will be as follows: If the indictment charges this element and the trial judge finds that proof of this element may violate Tenn. R. Evid. 404(b), the trial judge may wish to bifurcate this part of the trial and charge this element in a supplemental instruction patterned after an amended version of T.P.I. Crim. 31.05(a) after the second phase of the trial.
- c. Add the following text to the end of Comment One: For offenses committed on or after 5/21/12, stalking is a Class E felony if the defendant, at the time of the offense, was required to or was registered with the Tennessee Bureau of Investigation as a sexual offender, violent sexual offender or violent juvenile sexual offender. T.C.A. § 39-17-315(b)(3).

31.03 - Unlawful Drug Paraphernalia Uses and Activities

- a. In the definition section on p. 924, add the following language to the end of the definition for "Drug paraphernalia." Footnote 7 should be moved to the end of this new language AND the text of footnote 7 should be changed to "T.C.A. § 39-17-402(12)." The new language which is being added to the drug paraphernalia definition is as follows:
 - "Drug paraphernalia" includes, but is not limited to:
 - (A) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant that is a controlled substance;
 - (B) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances; and
 - (C) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:
 - (i) Metal, acrylic, glass, stone, or plastic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
 - (ii) Water pipes;
 - (iii) Carburetion tubes and devices;
 - (iv) Smoking and carburetion masks;
 - (v) Chamber pipes;
 - (vi) Carburetor pipes;
 - (vii) Electric pipes;
 - (viii) Chillums;
 - (ix) Bongs; and
 - (x) Ice pipes or chillers.
- b. In a new paragraph immediately following this expanded definition of "drug paraphernalia" add the following text:

In determining whether a particular object is drug paraphernalia as defined above, the jury shall, in addition to all other logically relevant factors, consider the following:

- (1) Statements by the owner or anyone in control of the object concerning its use;
- [(2) Prior convictions, if any, of the owner or of anyone in control of the object for violation of any state or federal law relating to controlled substances or controlled substance analogues;]
- (3) The existence of any residue of controlled substances or controlled substance analogues on the object;
- (4) Instructions, oral or written, provided with the object concerning its use;
- (5) Descriptive materials accompanying the object that explain or depict its use;
- (6) The manner in which the object is displayed for sale;
- (7) The existence and scope of legitimate uses for the object in the community; and
- (8) Expert testimony concerning its use.
- c. Immediately following the closing bracket after element (2) of this new section, add a footnote with the following text: T.C.A. § 39-17-424. The trial judge may wish to remove factor (2) if not applicable, renumbering the remaining factors accordingly, or have a Tenn. R. Evid. 404(b) hearing prior to charging factor (2) and allowing introduction of prior convictions of the defendant.

31.05 - Simple Possession

- a. Add the following new paragraph as the final paragraph of this instruction following the definition of "intentionally": [It is an exception to this offense that the controlled substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice. (INSERT A FOOTNOTE) If the defendant proves this exception by a preponderance of the evidence, (INSERT FOOTNOTE) you must find [him] [her] not guilty.]
- b. The first footnote in this new paragraph will have the following text: T.C.A. § 39-17-418(a)
- c. The second footnote in this new paragraph will have the following text: T.C.A. § 39-11-202(b)(2). The trial judge should utilize T.P.I. CRIM. 42.01, Preponderance of Evidence.

31.20 - Controlled Substance Analogue

- a. On p. 977, add brackets around option "(C)" near the top of the page. Immediately following the closing bracket, which should appear between the semi-colon and the word "and" add a footnote with the following text: T.C.A. § 39-17-424. The trial judge may wish to remove factor (2) if not applicable, renumbering the following factors accordingly, or have a Tenn. R. Evid. 404(b) hearing prior to charging factor (2) and allowing introduction of prior convictions of the defendant.
- b. In the first paragraph of this instruction, add the following (in italics) after "[casually exchanged]": [represented] [advertised] [inferred]

31.21 - Controlled Substance Analogues: Unlawful Representation, Advertisement or Inference

a. New instruction.

40.04 - Defense: Entrapment

a. Add the following language as a new comment:

State v. Blackmon, 78 S.W.3d 322, 331 (Tenn. Crim. App. 2001), provides as follows with regard to the circumstances in which the trial court must instruct on entrapment:

The threshold question of whether the defense of entrapment has been "fairly raised" is for determination by the judge and not the jury. Nonetheless, where the proof fairly raises the issue of entrapment, and the proof is supported by credible evidence, the trial court is required to give the instruction of entrapment whether requested or not. To determine when this statutory defense is fairly raised by the proof so as to require its submission to the jury, a court must, in effect, consider the evidence in the light most favorable to the defendant, including all reasonable inferences flowing from that evidence. See State v. Bult, 989 S.W.2d 730, 733 (Tenn. Crim. App. 1998), perm. to appeal denied, (Tenn. 1999) (citing State v. Shropshire, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993)). Thus, if entrapment is, in fact, "fairly raised by the proof," the issue of predisposition becomes a question of fact for the jury. See also Sherman v. United States, 356 U.S. at 377, 78 S.Ct. 819.

T.P.I. - CRIM. 31.21

CONTROLLED SUBSTANCE ANALOGUES: UNLAWFUL REPRESENTATION, ADVERTISEMENT OR INFERENCE

Any person who commits the offense of unlawful [representation] [advertisement] [inference] of a controlled substance analogue is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

(1) that the defendant [represented, orally or in writing,] [advertised]
[inferred] that a substance [was a derivative of, or substantially
similar to, the chemical structure of a controlled substance] [had a
stimulant, depressant, or hallucinogenic effect on the central
nervous system substantially similar to or greater than the
stimulant, depressant, or hallucinogenic effect on the central
nervous system of a controlled substance] [was (insert here a
substance listed in § 39-17-452)];

and

(2)	that the substance was a controlled substance analogue;
	and
(3)	that the defendant acted intentionally, knowingly or recklessly. ²
[
1/	/ is a controlled substance.1⁴

"Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.⁵

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.⁶

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.⁷

[It is not a defense that the controlled substance analogue (A) is not a derivative of a controlled substance, (B) does not have a chemical structure that is substantially similar to that of a controlled substance, (C) does not have a stimulant, depressant, hallucinogenic effect on the central nervous system substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance, or (D) is not listed in § 39-17-452.]⁸

COMMENTS

1. A violation of this offense is a Class A misdemeanor. T.C.A. § 39-17-454(g)(4). However, the building and premises of any business in or upon which a violation is committed by an employee, agent or owner of such business is declared to be a public nuisance and shall be subject to abatement as provided in title 29, chapter 3. T.C.A. § 39-17-454(j).

¹ T.C.A. § 39-17-454(f)(1).

² T.C.A. § 39-11-301(b) and T.C.A. § 39-11-301(c) and accompanying Sentencing Commission Comment.

³ The trial judge should include this bracketed language if the controlled substance analogue is one listed in T.C.A. § 39-17-452 as an analogue. If it is not listed, it will be a jury question, and the trial judge should utilize 31.20, Controlled Substance Analogue.

⁴ "Controlled substance" means a drug, substance or immediate precursor in Schedules I through VII of §§ 39-17-403 – 39-17-416. T.C.A. § 39-17-402(4).

⁵ T.C.A. § 39-11-106(a)(31).

⁶ T.C.A. § 39-11-106(a)(20).

⁷ T.C.A. § 39-11-106(a)(18).

⁸ T.C.A. § 39-17-454(f)(2).